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CONFIDENTIAL & PROPRIETARY
"BUSINESS INFORMATION" UNDER 29 CFR § 70.26(B) (AS AMENDED, 71 FED.
REG. 30762, 30767 (MAY 30, 2006))

October 6, 2017

VIA EMAIL ONLY: OFCCP_NO_FOIA@dol.gov

Ms. Candice Spalding
Deputy Director
Division of Management and Administrative Programs
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW
Room C-3325
Washington, DC 20210

Attn: EEO-1 Disclosure Objection

Re: Freedom of Information Act (FOIA) Request Tracking No. 838133

Dear Ms. Spalding:

This will acknowledge receipt of the Office of Federal Contract Compliance Programs' ("OFCCP") letter dated September 1, 2017, regarding a Freedom of Information Act ("FOIA") request for EEO-1 reports submitted by Splunk Inc. The OFCCP obtained Splunk's EEO-1 reports through the Joint Reporting Committee ("JRC") and maintains this data on the OFCCP's data systems. As we understand OFCCP's September 1, 2017 letter, OFCCP proposes to release to Mr. Will Evans of the Center for Investigative Reporting electronic EEO data including race and gender information by EEO-1 occupational category (and including establishment-level reports) that Splunk submitted for 2015.

This letter sets forth Splunk's objections regarding the proposed release of the above-referenced EEO-1 information. We also provide the Declaration of Grant Bassett which establishes the factual bases for our objections. These objections are directed at the specific EEO-1 reports that OFCCP has indicated are subject to the proposed disclosure. However, our objections apply with equal force to any of Splunk's EEO data within OFCCP's custody. We appreciate both OFCCP's sensitivity to the competitive environment in which a high technology company like Splunk operates and the opportunity to provide our objections to the disclosure of the EEO-1 reports, which contains highly confidential and commercially-sensitive information.

Summary of the Legal Bases of Splunk's Objections

Splunk objects to the release of its EEO data based on the following legal grounds: (1) the EEO-1 reports contain confidential commercial information exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4); and (2) Congress intended that the EEO data would be protected from disclosure as reflected in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e).

Discussion

A. Splunk's EEO-1 Data Contain Confidential Commercial Information Under Exemption 4

FOIA Exemption 4 protects confidential commercial information from mandatory disclosure. There are two different tests for determining whether information is confidential commercial information: (1) information that entities submit voluntarily to the government is protected upon a showing that the entity customarily would not release the information to the public; and (2) information that is submitted pursuant to a legal obligation is protected upon a showing (a) that the entity faces actual competition and (b) that the release of the information would likely result in substantial harm to the entity's competitive position. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879-80 (D.C. Cir. 1992) (*en banc*); *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Splunk's EEO-1 reports qualify for protection under either of these two standards.

1. Splunk Voluntarily Submitted its EEO-1 Reports to OFCCP

A contractor that submits information to OFCCP in response to OFCCP regulatory requirements, such as a scheduling letter notifying the contractor of a compliance review, does so voluntarily. *See OFCCP v. Bank of America*, 1997-OFC-00016 (A.L.J. Aug. 11, 2004) (on remand from *OFCCP v. Bank of America*, No. 00-079, 2003 WL 1736803 (Dep't of Labor Mar. 23, 2003)). In *Bank of America*, the Administrative Law Judge noted OFCCP's position on this issue:

In response to Defendant's claim that it had no choice but to acquiesce because of the "threatening" nature of the scheduling letter written under a "claim of lawful authority," OFCCP argues that the letter in no way coerced the Defendant because it did not state or even imply that BOA had no right to resist the search. Instead, OFCCP maintains that the scheduling letter merely identified its authority and intentions under Executive Order 11246, which is not a show of authority that makes any subsequent consent nonconsensual. And, even if the letter had addressed the consequences of BOA's failure to comply, as the Defendant contends, OFCCP maintains that this would not be coercive to the point of rendering BOA's consent involuntary. The Plaintiff notes that any enforcement action undertaken by OFCCP would provide BOA with a full hearing before sanctions could be levied, thereby mitigating any immediate threat possibly perceived by BOA.

Slip Op. at 9-10 (citations omitted). The ALJ essentially agreed with OFCCP's position. *Id.* at 15-18. In later proceedings in that case, OFCCP argued that submission of data would be voluntary unless the Department of Labor formally ordered the contractor to provide the data after an administrative enforcement action. *OFCCP v. Bank of America*, No. 2006-OFC-00003, Slip Op. at 12 n.14 (A.L.J. May 22, 2007); *see also Bank of America v. Solis*, slip op. at 17 (D.D.C. July 2, 2014) (agreeing with OFCCP's voluntariness argument); *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 93-94 (D.D.C. 2011) (same). OFCCP regulatory provisions require contractors to provide data to OFCCP during a compliance evaluation, just as OFCCP regulatory provisions require contractors to submit the EEO-1 reports. *Compare* 41 C.F.R. §60-1.7(a) (EEO-1 report requirement) *with* 41 C.F.R. §§ 60-1.12 and 1.20 (record retention and submission of materials to OFCCP during a compliance evaluation). Thus, OFCCP's position regarding the voluntary nature of submissions during a compliance review also applies to the submission of EEO-1 reports.

Similarly, in *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996), the EEOC investigated a reduction in workforce at McDonnell Douglas as a result of a number of discrimination charges filed against the company. *Id.* at 238. As part of its investigation, the EEOC issued subpoenas for the production of several documents in connection with the reduction including adverse impact analyses the company conducted on the workforce. *Id.* McDonnell Douglas objected to the subpoena but worked cooperatively with the EEOC and ultimately agreed to produce some of the requested materials. *Id.* During the investigation, a third party filed a FOIA request with the EEOC seeking, among other things, the adverse impact analyses McDonnell Douglas submitted to the EEOC. *Id.* The EEOC eventually agreed to release the documents, and notified the company of its intention to do so. *Id.* at 240. In district court, McDonnell Douglas argued that the disclosure of the adverse impact analyses was prohibited under FOIA Exemption 4 because the documents were confidential commercial information. *Id.* The EEOC argued that the documents were not produced voluntarily because they were produced pursuant to a subpoena. *Id.* at 241. The district court disagreed, and, in adopting the D.C. Circuit's decision in *Critical Mass*, held that "[t]he mere existence of agency subpoena power cannot, however, mean that any document that is produced pursuant to subpoena is 'required.'" *Id.* at 242. Such a conclusion "ignores that fact that subpoenaed parties may challenge, both administratively and through objections to enforcement proceedings, the Commission's subpoenas. It simply is not correct that *everything* the EEOC might ask for qualifies as 'required' under the *Critical Mass* test." *Id.* Had the production been compelled by a court, they would have been "required" under *Critical Mass*. *Id.* As in *Bank of America* and *McDonnell Douglas*, Splunk's EEO-1 reports were not produced under any binding judicial mandate. Rather, they were submitted to OFCCP voluntarily. Furthermore, Splunk has not customarily disclosed its EEO-1 reports to the public. *See* Declaration of Grant Bassett, at ¶ 7. Therefore, Splunk's EEO-1 reports are exempt from disclosure under FOIA Exemption 4. *See Critical Mass*, 975 F.2d at 879-80.

2. Release of the EEO-1 Reports Will Likely Result In Substantial Harm to Splunk's Competitive Position

Even assuming that Splunk did not voluntarily provide OFCCP with its EEO-1 reports—which it did—Exemption 4 would still apply because release of the EEO-1 data would likely result in substantial harm to Splunk's competitive position. Specifically, the EEO-1 reports provide

detailed workforce data, which reveals crucial insight into Splunk's business practices and strategic staffing initiatives. See Declaration of Grant Bassett, at ¶¶ 5-11. Releasing the 2015 EEO-1 data will allow Splunk's competitors to track hiring and retention decisions not only at specific locations, but across specific geographic regions and nationwide. This information, combined with publicly available information about the type of research or activities at particular facilities, would reveal Splunk's geographic staffing strategies and product strategies, allowing competitors to determine how Splunk is allocating resources in specific markets or product areas. *Id.* at ¶ 9.

Workforce data, including staffing patterns and workforce profiles (e.g., job categories, ethnic and sex classifications, etc.), are commercial information which fall within the FOIA Exemption 4. Courts have consistently recognized that disclosure of documents containing workforce data can cause substantial competitive harm by aiding competitors in raiding employees and in determining the utilization of a company's workforce. See *Audio Technical Services v. Dep't of Army*, 487 F. Supp. 779, 782 (D.D.C. 1979); *Metro. Life Ins. v. Usery*, 426 F. Supp. 150, 159-160 (D.D.C. 1976), *aff'd sub nom. in relevant part Nat'l Org. of Women v. Social Security Admin.*, 736 F.2d 727 (D.C. Cir. 1984); *Chrysler Corp. v. Shlesinger*, 565 F.2d 1172 (3d Cir. 1977), *vacated sub. nom., Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In particular, courts have recognized that EEO-1 information is subject to exemption under FOIA Exemption 4 when its disclosure would result in competitive harm. See *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *superseded by statute on other grounds as stated in CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1141 n. 62 (D.C. Cir. 1987); see also *Sears, Roebuck & Co. v. Gen. Services Admin.*, 553 F.2d 1378, 1382-83 (D.C. Cir. 1977).

Splunk also specifically objects to the disclosure of the EEO-1 reports and maintains that they are exempt from disclosure under FOIA Exemption 4 because releasing EEO-1 data would reveal historical hiring and retention information of Splunk (including information on specific job categories) and allow competitors of Splunk to ascertain our strategic focus. It will allow competitors to more closely target and direct resources toward Splunk product and sales initiatives, thus enabling competitors to unfairly compete with Splunk, especially at critical early stages of strategy implementation. See Declaration of Grant Bassett, at ¶¶ 9-10. Disclosure of this information would result in competitive harm. *Id.*; see also *Westinghouse*, 392 F. Supp. at 1249; *Sears*, 553 F.2d at 1382-83.

B. Release of Splunk's EEO-1 Reports Is Contrary to Congressional Intent Reflected in Title VII of the Civil Rights Act of 1964

Congress has expressed its intent to protect EEO data employers submit to the federal government from public disclosure. Title VII provides that "[i]t shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceedings under this title involving such information." 42 U.S.C. § 2000e-8(e). The heightened congressional concern about public disclosure of EEO data is reflected in the fact that Congress

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made disclosure of EEO data by EEOC officials or employees a crime, punishable by a \$1,000 fine or imprisonment for up to one year. *Id.*

This provision of Title VII does not reference OFCCP officials or employees. However, it has significant implications for OFCCP, because “[t]he legislative power of the United States is vested in Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by Congress and subject to limitations which that body imposes.” *Chrysler*, 441 U.S. at 302. In *Chrysler v. Brown*, the Court ruled that Congress had not delegated authority for OFCCP to promulgate regulations permitting it to disclose confidential commercial information and trade secrets submitted to the agency by contractors. *Id.* at 302-07.¹

Likewise, Congress did not delegate authority to OFCCP to adopt policies permitting the release of confidential EEO data contractors submit to OFCCP during a compliance review. *See Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169-72 (4th Cir. 1981) (OFCCP lacked a delegation of congressional authority to assert jurisdiction over an insurance company under a theory that the company was a subcontractor because it sold workers’ compensation insurance to contractors). Indeed, release of EEO data is directly contrary to the congressional intent manifested in Title VII. *See* 42 U.S.C. § 2000e-8(e). In Title VII, Congress adopted comprehensive legislation prohibiting race, gender and ethnicity discrimination in the workplace and created the EEOC to enforce the law. Congress authorized the EEOC to promulgate recordkeeping and reporting requirements necessary to enforce Title VII, but prohibited EEOC from releasing any EEO data obtained under that grant of authority. Presumably Congress did not enact this prohibition against release of EEO data out of any special concern about the competence of EEOC officials and employees. Thus, Congress cannot have intended to implicitly delegate authority to other federal agencies to collect the same EEO data and permit release of such data, where Title VII precludes the EEOC officials and employees from releasing that very data under penalty of imprisonment. OFCCP cannot take actions which are contrary to the congressional intent reflected in Title VII. *See United States v. East Texas Motor Freight Sys., Inc.*, 564 F.2d 179, 185-86 (5th Cir. 1977) (holding that OFCCP cannot assert that a bona fide seniority plan violates E.O. 11246 under a disparate impact theory of discrimination, because such action conflicts with Section 703(h), which declares such plans not to be unlawful under Title VII); *United States v. Transp. Mgmt. Inc.*, 662 F.2d 36, 42-45 (D.C. Cir. 1981) (same).

¹ The Court noted that “the origins of the congressional authority for Executive Order 11246 are somewhat obscure” but did not ultimately decide that question because it held that none of “arguable *statutory* grants of authority for the OFCCP disclosure regulations . . . are reasonably within the contemplation of that grant of authority.” 441 U.S. at 303. Because OFCCP lacked authority to promulgate regulations permitting the disclosure of contractors’ data, the Court concluded that the OFCCP regulations did not provide a basis for an exception to the Trade Secrets Act, which precludes agencies from releasing records submitted to them which contain information that “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or . . . confidential statistical data . . . of any . . . corporation . . . except as provided by law,” 18 U.S.C. § 1905. 441 U.S. at 301-08. The Court also held that an agency’s decision to release information protected by the Trade Secrets Act would form the basis for a claim under the Administrative Procedures Act. 441 U.S. at 317-18.

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Prior to the Supreme Court's ruling in *Chrysler v. Brown*, several lower courts held that Section 709(e) of Title VII does not preclude OFCCP's release of EEO data, including EEO-1 reports. See, e.g., *United Technologies Corp. v. Marshall*, 464 F. Supp. 845, 852 (D. Conn. 1979); *Chrysler v. Schlesinger*, 565 F.2d 1172, 1188 (3d Cir. 1977); *Nationwide v. Friedman*, 451 F. Supp. 736 (D. Md. 1978); *Crown Cent. Petroleum Corp. v. Kleppe*, 384 F. Supp. 996, 1002-03 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 295 (C.D. Cal. 1974); *Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 509 F. 2d 527 (D.C. Cir. 1974). These holdings do not survive the Supreme Court's decision in *Chrysler v. Brown* because they rely on grounds that assume that OFCCP's actions are not limited by congressional delegations of quasi-legislative authority. Thus, these holdings were based on rationales such as the fact that Section 709(e) of Title VII does not expressly mention OFCCP; that OFCCP and EEOC have different but complementary missions; that OFCCP is based on the executive's inherent power, not congressional power through Title VII; and that Congress rejected a proposal to transfer OFCCP to the EEOC, all of which are irrelevant to the question of congressional intent as to publication of EEO data, which is crucial after *Chrysler v. Brown*.

Conclusion

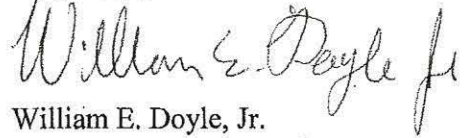
Splunk objects to the disclosure of its EEO-1 data as described herein, and requests that OFCCP refuse to disclose that information for the reasons identified. Specifically, Splunk objects to the disclosure because the data was submitted voluntarily, and, even if it were not, disclosure of the data would cause Splunk significant competitive harm. Disclosure is therefore prohibited under federal law. See U.S.C. § 552(b)(4) and 18 U.S.C. § 1905. Lastly, Title VII reflects Congress's clear intent that EEO-1 data not be disclosed, and OFCCP must respect congressional intent when considering FOIA requests for such data.

In the event that OFCCP disagrees with this position, Splunk respectfully requests that OFCCP provide pre-disclosure notification to enable the Company to discuss any disagreements with OFCCP and, if necessary, seek review by the appropriate United States District Court. Further, Splunk objects to the release of this objection letter and the accompanying Declaration of Grant Bassett, both of which constitute Confidential Business Information.

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If you have any questions with regard to the foregoing, I would be pleased to discuss them with you.

Very truly yours,

A handwritten signature in cursive script that reads "William E. Doyle Jr." with a stylized flourish at the end.

William E. Doyle, Jr.

CONFIDENTIAL & PROPRIETARY

**"BUSINESS INFORMATION" UNDER 29 CFR § 70.26(B) (AS AMENDED,
71FED.REG.30762, 30767 (MAY 30, 2006))**

**BEFORE THE UNITED STATES DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS**

In the Matter of FOIA Request Tracking No. 838133

Declaration of Grant Bassett

I, Grant Bassett, hereby declare and state as follows:

1. I am employed by Splunk Inc. ("Splunk") as Vice President, Global Talent Acquisition, Diversity and Inclusion.
2. I am familiar with Splunk's operations, business strategies, human resources functions and the overall staffing of the organization.
3. Founded in 2003, Splunk is a cutting edge technology company that provides innovative software solutions that enable organizations to gain real-time operational intelligence by harnessing the value of their data. The volume and diversity of digital information has grown exponentially due to the digital transformation of the global economy and the proliferation of applications, networks and devices. Machine data is produced by nearly every software application, network, server and device; indeed, just about anything with a computer chip. It contains a definitive record of customer behavior, user and machine activity, and security threats. With the right tools to make sense of the data, machine data can be extremely valuable to an organization, providing critical insights important to protect private, corporate, civilian and military networks from cyber-attacks, to assure that IT networks and applications operate properly, and to provide business insights. Yet no standards exist in the formats and semantics used in writing machine data, which makes such unstructured data difficult to process and analyze with traditional data management tools.
4. Splunk's offerings collect and index machine data on a massive scale – regardless of the format or source of the data – and enables users to quickly and easily search, explore, monitor, correlate and analyze large and diverse data sets, all in real time.
5. Splunk operates in a highly competitive technology market and competes against a variety of large software vendors and smaller specialized companies. These companies include those that target the big data market by commercializing open source software, such as the various Hadoop distributions and NoSQL data stores, including Elastic; security, systems management and other IT vendors, including BMC Software, CA Technologies, Hewlett Packard Enterprise, IBM, Intel, Microsoft, Dell Software and VMware; business intelligence vendors, analytics and visualization vendors, including IBM and Oracle; and cloud service providers, as well as small, specialized vendors that provide complementary and competitive solutions in enterprise data analytics, log aggregation and management, data warehousing and big data technologies.

6. I have reviewed the 2015 EEO-1 data Splunk provided to the Joint Reporting Committee from which Office of Federal Contract Compliance Programs ("OFCCP") obtained the data pertaining to FOIA Request No. 838133.
7. The 2015 EEO-1 data contain information that Splunk retains on a confidential basis. Splunk has not customarily disclosed such data to the public.
8. The 2015 EEO-1 data contain information that is business sensitive, and, if released, would likely result in substantial competitive injury to Splunk.
9. Releasing the 2015 EEO-1 data will allow Splunk's competitors to track hiring and retention decisions not only at specific locations, but across specific geographic regions and nationwide. This information, combined with publicly available information about the type of research or activities at particular facilities would reveal Splunk's geographic staffing strategies and product strategies, allowing competitors to determine how Splunk is allocating resources in specific markets or product areas. In 2015, for example, Splunk acquired Caspida, a leading provider of data science-driven Behavioral Analytics for security. EEO-1 data would contain headcount information before and after the transaction, as well as information regarding which facilities were opening or closing in a specific area, thereby allowing competitors to determine Splunk's confidential integration and product development strategies.
10. Releasing EEO-1 data would reveal historical hiring and retention information of Splunk (including information on specific job categories) and allow competitors of Splunk to ascertain our strategic focus. It will allow competitors to more closely target and direct resources toward Splunk product and sales initiatives, thus enabling competitors to unfairly compete with Splunk, especially at critical early stages of strategy implementation. For example, Splunk's increased hiring of engineers reflects our strategy related to expansion of our Cloud business. A competitor with access to our EEO-1 data would have been able to see personnel patterns that could have forecasted our strategy and gain a competitive advantage before the expansion became public.
11. Releasing this information, particularly information on job categories, would also provide competitors of Splunk with a recruiting and sourcing advantage. It will allow competitors to conduct targeted raids on the workforce of Splunk in order to more aggressively compete and achieve their business and diversity goals in specific job categories.

I declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the foregoing is true and accurate. Executed on this ___th day of October, 2017.

Grant Bassett
Vice President, Global Talent Acquisition, Diversity and
Inclusion
Splunk Inc.